Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

BETTY DOUGIA,

Petitioner,

v.

HOWARD GRAVES, individually and as Chancellor of the Texas A&M University System; JIM HULL, individually and as Director of Texas Forest Service; BOBBY YOUNG; GARY BENNETT; RICHARD DOTTELLIS; RODNEY MONK; DAVID COLTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD J. CLARKSON, ESQ.
595 Orleans
Suite 500
Beaumont, Texas 77701
(409) 833-7713

Counsel for Petitioner

QUESTION PRESENTED

1. Whether there existed legal or factual issues under 42 U.S.C. § 1983, and, the Fifth and Fourteenth Amendments to the United States Constitution against the Texas Forest Service because it, and its employees, made a bad-faith investigation of alleged timber theft due to its custom and practice of turning a blind-eye to timber theft by the Texas timber industry.

2. Whether or not the Texas Forest Service, or any of its employees, were entitled to a qualified immunity under federal law for their bad-faith investigation of timber theft complaints and their willful blind-eye to this custom and practice by the Texas forest industry.

PARTIES TO THE PROCEEDING

Betty Dougia
P.O. Box 8114
Lumberton, Texas 77657
(Petitioner)

J. Kevin Dutton
243 N. Austin, Suite 1
Jasper, Texas 75951
(Trial Attorney and Fifth Circuit Counsel for Petitioner)

Richard J. Clarkson, Esq.
595 Orleans, Suite 500
Beaumont, Texas 77701
(U. S. Supreme Court Counsel for Petitioner)

Gregg Abbott
(Attorney General of Texas, for Respondent)

Barry R. McBee
(Deputy Attorney General for Litigation, for Respondents)

Jeff L. Rose
(Chief, General Litigation Division, for Respondents)

Peter B. Plotts III
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capital Station
Austin Texas 78711-2548
(Attorneys for Respondents)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Betty Dougia ("Dougia"), respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2006 U.S. App. LEXIS 12217 (unpublished opinion).

JURISDICITON

The United States Court of Appeals for the Fifth Circuit issued an opinion in favor of Respondents on May 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

There is a question raised of whether or not the Texas Forest Service ("TFS") violated Dougia's Fifth or Fourteenth Amendment Rights to the ownership and benefits of the timber on her property by that agency's assistance in creating or increasing the danger of the theft of her timber by the Texas forest industry. These constitutional provisions are furthermore invoked because TFS had no discretion to grant or deny Dougia's plea to it to investigate and stop timber theft on her property.

STATEMENT

On June 30, 2003, Dougia initiated this suit in the 88th District Court of Hardin County, Texas, against the then Chancellor of the Texas A&M University System, General Howard Graves, and Hull, the Director of the TFS, in their official capacities and against Colton, Young, Bennett, Dottlellis, and Monk in their official and individual capacities. Dougia alleged violations of her rights under the Fifth and

Fourteenth Amendments to the federal constitution in connection with the investigation by TFS of allegations of timber theft. She also claimed that her timber was taken in violation of the Takings Clause of the Texas Constitution. The Defendants removed the case to the United States District Court the Eastern District of Texas based on federal question jurisdiction under 28 U.S.C. § 1441 (b) and thereafter moved for a reply under Federal Rule of Civil Procedure 7 (a) which the district court granted.

The Respondents moved for a summary judgment on the Eleventh Amendment grounds as to the claims asserted against them in there official capacities as well as the state constitutional claims. The district court observed that the Respondents may have waived their Eleventh Amendment immunity by removing a case to federal court. See, *Lapides v. Board of Regents of the Univ.Sys.of Ga.*, 535 U.S. 613, 619-24 (2002). The Respondents also asserted that they were entitled to summary judgment on the merits of all claims and on the grounds of qualified immunity as to Dougia's claims pursuant to 42 U.S. § 1983; as well as a defense that the statute of limitations had run on the section 1983 claims.

The trial court granted the Respondents motion for summary judgment holding that Petitioner's federal and state constitutional claims were without merit and that the Respondents were entitled to qualified immunity from Petitioner's federal constitutional claims. The trial court's ruling went far beyond the grounds argued by Respondents.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed the trial courts rulings as described above on May 18, 2006. No motions for rehearing were filed by the Petitioner. All conditions precedent to the filing of this Petition for Writ of Certiorari have been met.

REASONS FOR GRANTING THE PETITION

Dougia's *First Amended Complaint* was her pleading upon which the respondents filed their *Motion for Summary Judgment*. It sets out certain facts that were never contested. Dougia called the TFS's Theft Hotline to report her theft. The factual allegations in that *Amended Complaint* set out the almost incestuous relationship between TFS and the Texas forest industry (ROA 45-52). The threshold question is: what sort of duty did TFS have when it became aware of specific claims of timber theft? This is a threshold question because of the statement by Justice Scalia, writing for the majority, in *Town of Castle Rock, Colorado v. Gonzales*, 125 S.CT. 2796, 2803, 162.Ed.L.2d 658 (2005). He began his analysis by noting that the Court's "cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion". He further noted that federal constitutional law determines whether a state-created interest rises to the level of an entitlement protected by due process (Id. at 2803-04). TFS had no discretion on this issue. It must investigate properly claims of timber theft and act accordingly. The Texas Natural Resources Code § 151.004 (3) specifically demanded that TFS set up and maintain a "timber theft hotline". That phone number is specifically set out in the statute as "1-800-364-3470". "[T]he intractable opposition and defiant attitude of the defendants toward the plaintiff's request for assistance" finally required a written opinion from the office of the Attorney General of the State of Texas requiring TFS to perform its official duties in this matter. See, informal letter ruling No. 32002-6043 (ROA 58-126). TFS's own press release of November 5, 2003, gave evidence that timber theft in East Texas is a major problem in that the TFS had spent the previous twelve months investigating many claims (ROA 56-57). In this regard, the Texas Legislature mandated certain "general duties" on the part of the Director of the TFS. The

Texas Education Code § 88.102 outlines those general duties of the Director of TFS:

> Under the general supervision of the board, the director shall:
>
> **(1)** assume direction of all forest interest and all maters pertaining to forestry within the jurisdiction of this state;
>
> **(2)** subject to the approval an confirmation of the board, appoint the assistants and employees necessary in executing the duties of his office and the purposes of the board, their compensation to be fixed by the board;
>
> **(3)** take any action deemed necessary by the board to prevent and extinguish forest fires;
>
> **(4)** enforce all laws pertaining to the protection of forests and woodlands and prosecute violations of those laws;
>
> **(5)** collect data relating to forest conditions; and
>
> **(6)** prepare for the board an annual report stating the progress and condition of state forestry work and recommending plans for improving the state system of forest protection, management, and replacement. (ROA 50)

See also, Texas Natural Resources Code §§ 151. 101; 152.012, et seq. These Texas Codes codify the Public Policy in Texas in favor of giving landowners whatever assistance they need from TFS. A recent case addressing these issues of Public Policy is found at *Harris v. Nelson*, 25 S.W. 3rd 917, 721-922 (Tex. App. – Beaumont 2002, no pet.). In analyzing the pertinent portions

of the Texas Natural Resources Code, the Beaumont Court of Appeals stated:

> The House Committee on Criminal Jurisprudence prepared a bill analysis concerning the background and purpose of Natural Resources Code, section 151.101. The analysis explains the objectives, circumstances of enactment, and, in part, the legislative history of section 151.101. See Harvesting of and Payment for Timber; Providing for Damages; Creating an Offense, 1997: House Comm. Report Bill Analysis on H.B. 1128 from House Comm. On Crim. Jurisprudence, 75th Leg., R.S., 1995 (1997). **The analysis informs us that theft was a primary concern of the legislature**. As background, the analysis noted that (a) timber is the number one agricultural commodity in the eastern part of Texas; (b) high timber prices make the forests in East Texas a "prime target for timber thieves;" and (c) the Texas Forest Service estimates "timberland owners have lost millions of dollars worth of trees to thieves." The stated purpose of the bill's pertinent section was to "address the unauthorized harvesting of timber" and provide "punishment for violations. (emphasis added)

The TFS policy of coziness with the Texas Forest Industry and indifference to lumber theft is in direct contradiction with the public policy of the State of Texas. It had an invariable duty to investigate timber theft claims and to insure that Dougia and other complainants' property interests were protected.

There is a "State-created danger" exception to the general rule that the State does not have an affirmative duty to protect its citizens from private acts of violence to a person's life or property. That exception comes into existence if a government entity substantially increases the likelihood that a private actor

would deprive an individual of her property rights. See, *DeShaney v. Winnebago County Dpt. of Social Services*, 489 U.S. 189, 195, 103 L.Ed. 32d 249, 109 S.Ct. 998 (1989), and its progeny. See also, *Howard v. Bayes*, 2006 U.S.App.LEXIS 20378; 2006 FED.App. 0285P(6 th Cir.) ("the courts prior 'property-as-entitlement' cases have all implicitly required the entitlement to have some monetary value to the entitlement holder in order to constitute a property interest"). No party to this case has questioned the Petitioner's property interest in the timber. The Petitioner had a procedural due process right to have TFS promptly and properly investigate her claim of timber theft. It has a statutory, and public policy, duty to work in good faith to eliminate the significant timber theft in Texas. Dougia had more than a mere abstract need or desire, or "unilateral expectation" to have her timber, and the timber of others similarly situated, protected from timber thieves. This was a matter of important public policy in Texas, set out in legislative history, and did not give TFS any discretion to refuse to assist land owners facing timber theft problems.

IMMUNITY CLAIMS

In considering whether there is a valid claim of qualified immunity on the part of the Respondents, the relevant, dispositive inquiry determining the claim, the Court must consider in particular: (1) whether the rights of Dougia in question were defined with reasonable specificity; (2) whether the decisional law of the United States Supreme Court and the applicable Circuit Court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. See, *Pena v. Deprisco*, et al, 432 F.3d 98, 115 (2d Cir., 2006). As discussed, TFS and its employees were not confronting an unwritten, uncodified jumble of vague custom or habit. The statutes and public policy at issue in this case are clear. TFS had no discretion on whether or not it would seek

to reduce the theft of timber in Texas. It had no discretion on whether or not it would properly investigate theft claims and resolve the property-right issues of those involved.

The Respondents' *Summary Judgment Motion* regarding Petitioner's section 1983 claims were based upon the defensive claim that the statute of limitations had run before this lawsuit had been filed (ROA 161-162). The trial court denied summary judgment on that limitations claim (ROA 245-246). The trial court rejected the Respondents Eleventh Amendment claims (ROA 246-248). The Respondents *did not seek* a Summary Judgment on the merits of the Petitioners *1983* claim. Thus, the trial court's discussion of the merits of the claims brought under Section 1983 is mere surplussage and advisory! (ROA 161-162, 248-253). See, *Celotex Corp. v. Catrett* , 477 U.S. 317, 326, 106 S.Ct. 2458, 91 L.Ed. 2d, 265 (1986) ("Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence. See 244 U.S. App. D.C. at 167-168, 756 F.2d, at 189 (Bork J. dissenting); 10AC. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983)"). Judge Krone gave no notice to any party that either her *Memorandum or Summary Judgment Order* would go far beyond those issues a*ctually* raised in the Respondents' *Motion for Summary Judgment*.

DOUGIA'S FIFTH AMENDMENT CLAIM

The Respondents challenged to Dougia's Fifth Amendment claim was that she did not assert that the TFS was the one that stole her timber! That is correct. The Petitioner's claim is not that TFS is a thief but that TFS failed in its statutory and public policy duties, duties that were non-discretionary, to stop the common practice in Texas of timber

thievery, and to investigate individual claims of timber thievery and to restore the property to its rightful owner or see to it that other compensation was obtained. The claim by TFS that it is not itself a thief is but a *red herring* raised by TFS to confuse the issues for the Courts. Dougia concede the fact that TFS is not a thief. Be it true or not, it is not a ground for a summary judgment under the *actual pleadings* in this case.

CONCLUSION

For the forgoing reasons, Petitioner submits that this Court should grant in view of this case to reverse the holding of the trial court and the United States Court of Appeals for the Fifth Circuit. Alternatively, the Court should grant plenary view of the judgment below.

Respectfully Submitted,

Richard J. Clarkosn, Esq.
595 Orleans, Suite 500
Beaumont, Texas 77701
(409)833-7713, Telephone
(409)833-8991, Facsimile

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2006 U.S. App. LEXIS 12217

No. 05-40036 Summary Calendar

BETTY DOUGIA, Plaintiff-Appellant,

versus

HOWARD D. GRAVES, Etc.; ET AL, Defendants,

DR. ROBERT D. MCTEER, Chancellor of the Texas A&M University System; JIM HULL, individually and as Director of Texas Forest Service; BOBBY YOUNG; GARY BENNETT; RODNEY MONK, Defendants-Appellees.

May 18, 2006, Filed

NOTICE: [*1] RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. USDC No. 1:03-CV-625.

OPINION:

PER CURIAM*

JUDGES: Before REAVLEY, HIGGINBOTHAM and CLEMENT, Circuit Judges.

Betty Dougia appeals the district court's grant of summary judgment for the defendants in her suit filed under 42 U.S.C.§ 1983 [*2] . Dougia alleged that her rights were violated under the United States Constitution and the Texas Constitution. Dougia asserted that she entered into a contractual agreement with a logger to remove timber from her property. Following the removal, she felt as though she was not properly compensated. Dougia called the Timber Theft hotline of the Texas Forest Service (TFS) and requested an investigation into the matter. The investigation was delayed, and the report that was compiled after the investigation concluded that she had been overpaid by the logger. Dougia alleged that the report was compiled in bad faith.

The district court dismissed defendants two defendants without prejudice because they were never served. The court granted the other defendants' motion for summary judgment, concluding that Dougia failed to show a constitutional violation under the Fifth or Fourteenth Amendment of the United States Constitution or the Takings Clause of the Texas Constitution. The court noted that Dougia did not contend that the defendants interfered with or took her property for public purposes without just compensation. In the alternative, assuming for the sake of argument that Dougia had established [*3] a constitutional deprivation, the district court found that the remaining defendants were entitled to qualified immunity.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4

On appeal, Dougia does not challenge the dismissal of her complaint as to the defendants who were not served. Nor does she challenge the finding of qualified immunity as to any defendant with the exception of Rodney Monk. Accordingly, all arguments regarding these findings of the district court are waived. See *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Dougia argues that the district court erred in granting summary judgment because there is a genuine issue of material fact regarding Monk's good faith. Dougia acknowledges that the state government did not take her property; she contends, in a one-sentence argument, that the TFS is responsible for the alleged taking because Monk filed a report that was not compiled in good faith. Monk's good faith is irrelevant, however; the district court granted summary judgment because Dougia did not prove any constitutional violations under either federal or state law. Dougia does not seriously challenge this finding on appeal and admits that her property was not taken by the state. As such, Dougia [*4] has waived any argument that she proved a constitutional violation. See *Hughes*, 191 F.3d at 613. Alternatively, she has not shown that the district court erred in granting summary judgment on grounds that she had not proved a constitutional violation.

The judgment of the district court is AFFIRMED.